IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-5066

IRVING JEROME DUNAWAY,

Petitioner,

-vs-

STATE OF NEW YORK,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF
THE STATE OF NEW YORK

EDWARD J. NOWAK, ESQ.
Monroe County Public Defender
BY: JAMES M. BYRNES, ESQ.
Assistant Public Defender
Of Counsel
36 West Main Street
Rochester, New York 14614

Attorney for Petitioner

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No.

IRVING JEROME DUNAWAY,

Petitioner,

-vs-

STATE OF NEW YORK,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF
THE STATE OF NEW YORK

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals of New York State affirming petitioner's conviction for felony murder and attempted robbery.

OPINIONS BELOW

The opinion of the Appellate Division, Fourth Department, reversing the suppression order of the Monroe County Court is reported at 61 A.D.2d 299, ___ N.Y.S.2d ___ (4th Dept.,1978). The opinion of the Monroe County Court ordering the evidence suppressed is not reported. The opinion of the Court of Appeals of New York State upon remand from the United States Supreme Court is reported at 38 N.Y.2d 812, 382 N.Y.S.2d 40, 345 N.E.2d 583 (1975).

The original granting of the petition for certiorari by the United States Supreme Court is reported at 422 U.S. 1053, 45 L.Ed.2d 705, 95 S.Ct. 2674 (1975). The original decisions of the Appellate Division, Fourth Department, and the Court of Appeals of New York State affirming the judgment of conviction without opinion are reported at 42 A.D.2d 689, 346 N.Y.S.2d 779 (4th Dept.,1973) and 35 N.Y.2d 741, 361 N.Y.S.2d 912, 320 N.E.2d 646 (1974) respectively.

JURISDICTION

The petitioner's conviction was affirmed by the Court of Appeals of New York State, except for the suppression issue,on December 29, 1975. The judgment of conviction became final in all respects when the Court of Appeals dismissed petitioner's application for leave to appeal to the Court of Appeals from the order of the Appellate Division, Fourth Department, reversing the Monroe County Court's suppression order. The petitioner's application for leave to appeal to the Court of Appeals was dismissed on May 10, 1978. Petitioner's motion for reargument on the judgment of conviction was denied on June 13, 1978. This Court's jurisdiction is invoked under 28 U.S.C. Section 1257(3).

QUESTIONS PRESENTED FOR REVIEW

1. May the State detain a person for custodial questioning on less than probable cause necessary for the traditional arrest.

2. If not, then were the statements and sketches obtained as the exploitation of the illegal arrest or were they so attenuated under the criteria enunciated in Brown v. Illinois, 422 U.S. 590, so as to purge the primary taint of the unlawful arrest.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

"The right of the people to be secure in

their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated..." Fourth Amendment to the United States Constitution.

"No person... shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law ..." Fifth Amendment to the United States Constitution.

"... nor shall any state deprive any person of life, liberty or property without due process of law..." Fourteenth Amendment to the United States Constitution.

STATEMENT OF CASE

The petitioner was convicted by jury trial of felony murder and attempted robbery on April 13, 1972. The charges arose out of an incident where, during the course of an attempted robbery of a pizza parlor by two males, one of the men (not the petitioner) shot and killed the proprietor. The conviction was appealed, one of the grounds being that the incriminating admissions and sketches made by the petitioner should have been suppressed prior to trial by reason of the fact that they were obtained as a result of an illegal arrest without probable cause. The Appellate Division, Fourth Department, at 42 A.D.2d 689 and the Court of Appeals of New York State, at 35 N.Y.2d 741, both affirmed the judgment of conviction without opinion. The United States Supreme Court, at 422 U.S. 1053, granted the petition for the writ of certiorari, vacated the judgment and remanded the case for further consideration in light of the then recent decision in Brown v. Illinois, 422 U.S. 590. Upon remand the Court of Appeals of New York State remitted the case to the Monroe County Court for a factual hearing to determine the following questions:

1. Was there a detention of the defendant by the police?
2. What was the nature of that detention?
3. Was there probable cause for the detention?

4. If there was a detention without probable cause, then was the confession rendered infirm by the illegal arrest under Brown v. Illinois, 422 U.S. 590?

The facts adduced at the hearing showed that the following occurred:

On August 10, 1971, Detective Fantigrossi, chief of the physical crimes squad for the Rochester Police Department, received a call at his home from Detective Mickelson. Mickelson told Fantigrossi that an informant, one O.C. Sparrow, had received information regarding the homicide and attempted robbery which had occurred at the Tower of Pizza on March 26, 1971. Fantigrossi went to police headquarters where he interviewed Sparrow. He had not been acquainted with Sparrow before this time.

Sparrow related the information given to him by one James Cole, who was at that time an inmate of the Monroe County Jail. It appears that Cole had told Sparrow that he (Cole) had committed the crime along with a person named Irving, a/k/a "Axlerod". Sparrow told Fantigrossi he knew who Irving was and picked out the petitioner's picture from the mug files.

Since Cole was in custody at the Monroe County Jail on an unrelated charge, Fantigrossi was able to interview Cole personally. After two hours of questioning, Cole finally admitted that he had no part in the crime. Cole then told Fantigrossi that one Hubert Adams, an individual with whom Cole had been incarcerated at the Monroe County Jail, had stated to Cole that Hubert Adams' brother, a/k/a "Ba Ba", had committed the crime and that an individual named Irving was also involved. This conversation between Cole and Hubert Adams took place approximately two months before Cole was questioned by Fantigrossi. On August 10, 1971, when Fantigrossi questioned Cole, Hubert Adams was incarcerated at Elmira Correctional Facility, Elmira, New York.

Fantigrossi then issued order to pick the petitioner up and bring him in. Fantigrossi testified at the hearing that he wanted the petitioner brought in to police headquarters so that he could be interrogated regarding the homicide.

He admitted further that he knew at the time he issued the order that he did not have enough information to obtain a warrant.

On the morning of August 11, 1971, at approximately 8:00 A.M., Detective Mickelson and two other detectives, Ruvio and Luciano went to the petitioner's home. They were wearing plain clothes and arrived in an unmarked car. They had been to the Dunaway residence several times the preceeding night and the remainder of the night they spent combing the west side of Rochester for the petitioner.

When they arrived at petitioner's home, Mickelson and Ruvio went to the door where they were met by petitioner's mother. They entered and searched through the rooms of the house. Luciano remained outside in the driveway where he could observe anyone attempting to escape from a side window or door. He observed a young woman exit the side door, walk down the street, turn the corner and enter the third house from the corner.

When Mickelson came out of the petitioner's residence, he and Luciano walked down to the house that the young woman was seen entering. The petitioner came to the door and Mickelson said "Axlerod Dunaway". The petitioner's testimony was that one of the detectives grabbed him, but neither of the detectives recalled touching him. The petitioner asked the detectives repeatedly why he had to go downtown, but was only told he would find out when they arrived there.

The petitioner was taken to police headquarters where, shortly

after his arrival, he was turned over to Detective Novitsky for interrogation. According to police testimony he was given his Miranda warnings and immediately thereafter he admitted his implication in the crime and drew two sketches at Detective Novitsky's behest.

At the time of the arrest the petitioner was an eighteen year old who had gone as far as the tenth grade. He was approximately 5'7" tall and weighed about 130 lbs. Detective Mickelson was approximately 6'3" tall and weighed 203 lbs. Detective Luciano was taller and heavier than Mickelson. Both of the detectives testified that they were armed and both were prepared to use force to effect the arrest if necessary.

On March 11, 1977, the Monroe County Court (J. Mark) rendered a decision finding that the petitioner did not voluntarily accompany the detectives to the police station, that there was no probable cause for the arrest, that there was no claim or showing by the People that the statements and sketches were attenuated so as to purge the taint of the illegal arrest, and that they should have been suppressed prior to trial. The Appellate Division reversed this determination and the Court of Appeals of New York State dismissed the application for further appeal for lack of jurisdiction.

REASONS FOR GRANTING THE WRIT

I.

This case squarely addresses the question of whether the State may detain an individual for custodial questioning on less than probable cause required for a traditional arrest, a question which the Court has already conceded is of manifest importance. Morales v. New York, 396 U.S. 102, 24 L.Ed.2d 299, 90 S.Ct. 291 (1969). In People v. Morales, 42 N.Y.2d 129, 397 N.Y.S.2d 587, 366 N.E.2d 248 (1977), the New York Court of Appeals, upon remand

from this Court, reaffirmed its earlier holding that, lacking probable cause, law enforcement officials may detain an individual upon a reasonable suspicion for custodial questioning for a reasonable and brief period of time under carefully controlled conditions sufficient to protect his Fifth and Sixth Amendment rights. see People v. Morales, 22 N.Y.2d 55, 290 N.Y.S.2d 898, 238 N.E.2d 307 (1968). This holding of New York State's highest court is in direct conflict with this Court's previous decisions and virtually emasculates the protections provided by the Fourth Amendment for the citizens of New York State.

In the area of the Fourth Amendment freedom from unreasonable search and seizure, whether the seizure be of property or of the individual, the touchstone of this Court in its decisions has always been probable cause. Brown v. Illinois, 422 U.S. 590, 45 L.Ed.2d 416, 95 S.Ct. 2254 (1975); Gerstein v. Pugh, 420 U.S. 103, 43 L.Ed.2d 54, 95 S.Ct. 854 (1974); Cupp v. Murphy, 412 U.S. 291, 36 L.Ed.2d 90, 93 S.Ct. 2000 (1973); Davis v. Mississippi, 394 U.S. 721, 22 L.Ed.2d 676, 89 S.Ct. 1394 (1969); Beck v. Ohio, 379 U.S. 89, 13 L.Ed.2d 142, 85 S.Ct. 223 (1964); Ker v. California, 374 U.S. 23, 10 L.Ed.2d 726, 83 S.Ct. 1623 (1963); Henry v. United States, 361 U.S. 98, 4 L.Ed.2d 134, 80 S.Ct. 168 (1959); Draper v. United States, 358 U.S. 307, 3 L.Ed.2d 327, 79 S.Ct. 329 (1959); Brinegar v. United States, 338 U.S. 160, 93 L.Ed. 1879, 69 S.Ct. 1302 (1949); Carrol v. United States, 267 U.S. 132, 69 L.Ed. 543, 45 S.Ct. 280 (1925).

This case does not involve the limited intrusion upon reasonable suspicion by law enforcement officers in a typical street encounter, Adams v. Williams, 407 U.S. 143, 32 L.Ed.2d 612, 92 S.Ct. 1921 (1972); Terry v. Ohio, 392 U.S. 1, 20 L.Ed.2d 889, 88

S.Ct. 1868 (1968). On the contrary, this case involves a full-blown seizure of the petitioner's person, whether it be termed an arrest or an investigative detention. see Davis v. Mississippi, 394 U.S. 721,726,727, 22 L.Ed.2d 676,680,681, 89 S.Ct. 1394,1397 (1969). The seizure was made upon information so scant and so unreliable that, at best, it was mere rumor. cf. Draper v. United States, supra; see also Spinelli v. United States, 394 U.S. 410, 21 L.Ed.2d 637, 89 S.Ct. 584 (1969); Aguilar v. Texas, 378 U.S. 108, 12 L.Ed.2d 723, 84 S.Ct. 1509 (1946).

It is the petitioner's contention that the police conduct in this case is exactly the same type of conduct which the exclusionary rule under the Fourth Amendment was designed to protect the citizenry against. Mapp v. Ohio, 367 U.S. 643, 6 L.Ed.2d 1081, 81 S.Ct. 1684 (1961). This type of detention, in many instances, may be more invidious than a formal arrest where the suspect is apprised of what he is being charged with at the outset. This Court should review the validity of the investigative detention sanctioned by the New York Court of Appeals in People v. Morales, supra, in light of the right to be free from unreasonable seizures under the Fourth Amendment.

II.

This case also offers this Court the opportunity to clarify the criteria set forth in Brown v. Illinois, 422 U.S. 590, 45 L.Ed.2d 416, 95 S.Ct. 2254 (1975), to be used in determining whether a statement following an illegal arrest is obtained by exploitation of the illegal arrest or rather that the statement is so attenuated that it has been purged of the primary taint.

The trial court found that the People made "no claim or showing... of any attenuation of the defendant's illegal detention" ... (see J. Mark's opinion appended hereto). In reversing the trial

court, the Appellate Division, Fourth Department, in a three-judge majority opinion found that there was sufficient attenuation of primary taint due to the fact that the defendant had testified that he was never threatened or abused by the police, and that he was given his Miranda warnings. People v. Dunaway, 61 A.D.2d 299,303 (1978). The majority opinion does not give weight to the fact that the statement was made almost immediately upon the petitioner's arrival at the police station, that there were absolutely no intervening circumstances between the arrest and the statement, and that the police, upon information no better than a rumor and knowing they did not have enough information to obtain a warrant, seized the petitioner for the purpose of questioning him incommunicado at the police station regarding the homicide. Both the concurring opinion (J. Denman) and the dissent (J. Cardamone) agreed that the attenuation was insufficient if the initial seizure was illegal. The facts in the case at bar "are almost on point with those in Brown." (People v. Dunaway, supra, J. Cardamone dissenting).

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for writ of certiorari should be granted.

Respectfully submitted,

JAMES M. BYRNES

Attorney for Petitioner

P. O. ADDRESS:
Monroe County Public Defender's Office
36 West Main Street
Rochester, New York 14614

APPENDIX

TABLE OF CONTENTS

ALL OF THE ABOVE D CUMENTS
APPEAR IN THE PRINTED APPENDIX
VOLUME AND HAVE NOT BEEN
REPRODUCED HERE.